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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket 92-266
	)	MM Docket 93-215
	)	
Rate Regulation	)	

PETITION OF BELL ATLANTIC[1] FOR FURTHER RECONSIDERATION

While the Commission's orders in these proceedings have taken important steps toward establishing a measure of regulatory parity between the rules that apply to the cable and telephone industries, more remains to be done. In particular, significant disparities remain in the price cap rules for the respective industries, and in the rules governing the cost of customer equipment.[2] Although these issues were the subject of a previous

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[1] The Bell Atlantic telephone companies are Bell Atlantic - Delaware, Inc., Bell Atlantic - District of Columbia, Inc., Bell Atlantic - Maryland, Inc, Bell Atlantic - New Jersey, Inc., Bell Atlantic - Pennsylvania, Inc., Bell Atlantic-Virginia, Inc., and Bell Atlantic - West Virginia, Inc.

[2] See Implementation of Sections of the 1992 Cable Act - Rate Regulation, MM Dkt 92-266, 2d Order on Recon., 4th Report and Order, and 5th NPRM (rel. Mar. 30, 1994) ("Benchmark Order"); Implementation of Sections of the Cable Act of 1992 - Rate Regulation, MM Dkt 93-215, Report and Order and FNPRM (rel. Mar. 30, 1994) ("Cost of Service Order"); Implementation of Sections of the Cable Act of 1992 - Rate Regulation, MM Dkt 92-266, ¶ 148-150 (rel. March 30, 1994) ("Third Reconsideration Order").

petition for reconsideration by Bell Atlantic,[3] they were not addressed by the Commission's orders. As a result, the Commission should now reconsider its rules to the extent necessary to eliminate these disparities.

The Commission itself has found that, "as the cable and telephone industries converge, it is important to treat them with as much regulatory parity as possible."[4] Competition between these previously distinct industries is intensifying, and one-sided regulatory constraints will serve only to artificially favor or handicap one competitor over another to the ultimate detriment of consumers. Nevertheless, cable remains subject to far fewer regulatory burdens than telephone companies and continues to receive preferred treatment in any number of respects.

Examples of the preferred treatment given to cable abound: cable benefits from pure price caps since they have no sharing provisions,[5] but telephone companies do not; cable can set its own depreciation rates according to the dictates of the market,[6] but telephone companies can not; cable can recover some of the cost of customer equipment in regulated rates,[7] but

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[3] Petition of Bell Atlantic for Limited Reconsideration, MM Dkt 92-266 (June 21, 1993) (copy attached).

[4] Benchmark Order at ¶ 162, n.213.

[5] Id. at ¶ 169-170.

[6] Cost of Service Order at ¶ 133.

[7] Third Reconsideration Order at ¶ 148-150.

telephone companies can not; cable can pass through costs in higher rates even if the costs are within its power to control,[8] but telephone companies can not; cable stands to benefit from a reasonable productivity offset,[9] but telephone companies for now do not; and cable is not subject to the same accounting, cost allocation, affiliate transaction, and other rules as it moves into telephony that already apply to telephone companies -- at least, not yet.[10]

Some of these disparities will be the subject of future proceedings and need not be addressed here. Two others, however, were the subject of Bell Atlantic's previous petition for reconsideration but were not addressed by the Commission. These disparities should now be eliminated.

First, while the price cap plan for telephone companies incorporates a sharing mechanism and an archaic three year depreciation prescription process that are relics of rate of return regulation,[11] cable benefits from a pure price cap plan

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[8] For example, cable operators are permitted to pass through programming costs as exogenous, even though these costs are no more beyond cable's control than are the costs of network equipment for telephone companies. See Benchmark Order at ¶ 171.

[9] See Cost of Service Order at ¶ 314-323 (proposing a lower offset for cable than currently applies to telephone companies).

[10] See Id. at ¶ 305-313 (initiating further proceedings on these issues).

[11] See Policy and Rules for Dominant Carriers. 5 FCC Rcd 6786 (1990).

that contains none of these elements.[12] This disparate treatment cannot be justified, and the price cap rules for the two industries must be brought into alignment.

As Bell Atlantic recently explained in the ongoing review of the price cap rules for telephone companies, by far the best way to resolve this disparity is to apply the same pure price caps and depreciation rules to telephone companies that have been adopted for cable.[13] This will promote economically efficient investment by both industries in the nation's infrastructure to the benefit of consumers, permit the use of depreciation rates in line with the economic dictates of the marketplace, and lessen the burdens imposed on industry and regulators alike.[14]

The cable industry appears to disagree, however. It has argued in the telephone proceedings that an appropriate price cap scheme must include both a sharing mechanism and the prescription of depreciation at the rates currently applied to telephone companies.[15] Cable is wrong, and these remaining elements of rate of return regulation should be eliminated for

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[12] See, e.g., Benchmark Order at ¶ 169-170.

[13] See Comments of Bell Atlantic, filed in Price Cap Performance Review for Local Exchange Carriers, CC Dkt 94-1 (May 9, 1994).

[14] Id. at 7-13.

[15] Comments of the California Cable Television Ass'n, filed in Price Cap Performance Review for Local Exchange Carriers, CC Dkt No. 94-1, at 2 (May 9, 1994).

both industries. Moreover, cable can not have it both ways. If the Commission departs from the economically correct result and fails to adopt pure price caps for telephone companies, the rules for cable must be modified to correspond to the rules that ultimately are adopted for telephone companies. Preferential treatment for cable simply cannot be justified.

Second, the Commission's rules permit cable to bundle the cost of promotional customer equipment offerings into general system overheads for recovery from the rates for other regulated services.[16] The result of this is that cable will be able to offer free or cut rate equipment as an inducement to sign up for its service, only to recover the cost of this equipment from regulated monthly cable rates. Because telephone companies are not permitted to do the same, these rules would give cable operators an artificial competitive advantage.

Consequently, the Commission should modify its customer equipment rules to provide the same treatment for cable and telephone companies alike -- either by subjecting cable to the same constraints as telephone companies, or giving telephone companies the same flexibility as cable.

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[16] Third Reconsideration Order at ¶ 148-150. The only limit is that the rates for regulated services cannot increase above the applicable price cap as a result. Id.

CONCLUSION

The Commission should reconsider its rate regulation rules in the respects identified above.

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	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket 92-266
	)	
Rate Regulation	)	

PETITION OF BELL ATLANTIC[1]
FOR LIMITED RECONSIDERATION

1. Introduction and Summary

Competition between the cable and telephone industries is increasing rapidly as cable moves extensively into traditional telephone services free of the regulatory constraints that apply to telephone companies. As this competition intensifies, parity of regulatory treatment between the two industries is increasingly important if the marketplace is to function free of one-sided regulatory constraints that artificially favor or handicap particular competitors.

The Commission's Order in this proceeding is an important step in this direction.[2] Nevertheless, the rules

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[1] The Bell Atlantic telephone companies ("Bell Atlantic") are The Bell Telephone Company of Pennsylvania, the four Chesapeake and Potomac telephone companies, The Diamond State Telephone Company, and New Jersey Bell Telephone Company.

[2] Rate Regulation, MM Dkt 92-266, Report and Order (rel. May 3, 1993) ("Order").

adopted here for cable diverge from those that apply to telephone companies in several important respects. For example, the Order establishes price cap rules for cable with preferential terms compared to those that apply to telephone companies;[3] it also permits costs of cable CPE to be recovered from basic rates while the rules for telephone CPE do not.[4] Moreover, by declining to regulate basic rates where local authorities do not, the Commission's rules not only give preferential regulatory treatment to cable, but in many instances would leave basic cable service free of any regulation at all.[5]

Ultimately, true parity of regulation will exist only if the Commission applies to cable companies -- in both their cable and telephone operations -- regulations that parallel those that apply to local telephone companies. As an initial matter, however, the Commission should reconsider the rules adopted here to bring them into line with those that apply to telephone companies.

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3 Order at 144-165.

4 Id. at 184-191.

5 Id. at 44-47.

2. **The Commission Should Apply The Same Price Cap Rules To <u>Cable That Apply To Telephone Companies</u>**

Once cable rates have been set at a reasonable level, rates for both the basic and higher programming tiers are subject to price caps. If these price caps are applied in the same manner as those for telephone companies, they can provide an important measure of regulatory parity between the two industries. But if the rules arbitrarily give preferential treatment to cable, then cable will have an artificial competitive advantage that will act to the disadvantage of consumers and competitors alike. To ensure that this does not occur, the Commission should reconsider the price cap rules adopted here in two respects.[6]

First, the Order adopts what is essentially a pure price cap regime for cable.[7] Rates are subject to adjustment only for inflation and "external" (or exogenous) costs with no ceiling on the return that cable operators are permitted to earn.[8] In contrast, the "sharing" feature incorporated in the

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[6] As is already true for telephone companies, the price cap for cable should also include a "productivity factor" requiring annual rate decreases in real inflation-adjusted terms. Because the Commission will include this issue in its forthcoming Second Further Notice, <u>see</u> Order at 147 n.558, 152 n.577, it will not be addressed here.

[7] Order at 144-162.

[8] <u>Id</u>.

price cap rules for telephone companies places a fixed ceiling on their allowed return.[9]

There is no question that a pure price cap regime has many advantages over traditional regulation from the standpoint of both economics and public policy, at least for services that do not face competition.[10] Pure price caps provide greater incentives to improve productivity and efficiency, and to deploy advanced new technologies and services. They also reduce the administrative burden on both industry and regulators alike. As a result, there are many benefits to be gained from applying pure price caps to both the telephone and cable industries.

Nonetheless, the fact remains that telephone companies are currently subject to a sharing obligation. Since the cable and telephone industries are competing to deploy the same technologies and services, telephone companies would be at a severe disadvantage if cable operates under a pure price cap regime while telephone companies do not. Consequently, until the rules for telephone companies are modified, cable should be subject to a sharing obligation to the same extent as telephone companies.

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9 See, e.g., Policy and Rules Concerning Rates For Dominant Carriers, 5 FCC Rcd 6786, 6801-6802 (1990) ("LEC Price Cap Order").

10 As Congress recognized, even price caps are unnecessary in the presence of competition. 47 U.S.C. § 543(a)(2).

Second, the Commission should modify its rules to permit cable operators to pass through "external" costs only to the extent telephone companies can do the same. In general, the telephone rules permit external treatment only for costs "triggered by administrative, legislative or judicial action beyond the control of the carriers."[11] Also, because in the Commission's view the index used to adjust rates for inflation (GNP-PI) is "broadbased" and reflects price changes in all sectors of the economy,[12] telephone company costs have not been afforded external treatment unless they are unique and demonstrably not reflected in GNP-PI.[13]

Here, in contrast, the Commission's Order suggests that cable automatically would be afforded external treatment for several types of costs.[14] No showing that these costs are unique and not already reflected fully in GNP-PI is

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[11] LEC Price Cap Order at 6807.

[12] Id. at 6793.

[13] See, e.g., Treatment of LEC Tariffs Implementing Stmt. of Fin. Acct. Standards, "Employers Acct. for Postretirement Benefits Other Than Pensions", 8 FCC Rcd 1024, 1031-1035 (1992) ("OPEB Order").

[14] For example, automatic external treatment would be given to taxes, programming costs, retransmission fees, and franchise fees. Order at 153-63.

contemplated.[15] In fact, some costs such as taxes automatically would be treated as external for cable even though telephone companies have been denied the same treatment.[16] External treatment also would be granted to other costs, such as programming costs, that are no more outside cable's control than are the costs of network equipment for telephone companies.[17]

Giving such preferential treatment to cable cannot be justified, and the Commission should bring its rules for cable and telephone companies into line.

3. The Commission Should Apply The Same Rules To Cable CPE That Apply To Telephone CPE

The Commission's Order requires cable CPE to be provided on an unbundled basis, at rates established based on cost. Once again, these rules can provide an important measure of regulatory parity if they are applied in the same manner as

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15 While the costs could be passed through only to the extent the percentage increase in these costs exceed GNP-PI, this is different than determining whether the cost increase has already been factored into the "broadbased" GNP-PI in the first place.

16 See OPEB Order at 1032; Bell Atlantic Telephone Companies Tariff FCC No. 1, Transmittal 473, 7 FCC Rcd 1486, 1487 (1992) (tax law changes are "presumptively endogenous" and must "uniquely or disproportionately affect LECs...[to] qualify for exogenous cost treatment").

17 As the Commission recognizes, this is especially true in the case of programming obtained from affiliated programmers. Order at 158. Permitting cable operators to pass through increases paid to programming affiliates would merely shift cable's ability to recoup monopoly profits upstream to their programming affiliates.

the rules for telephone CPE, and the Commission should modify its rules to ensure that this is the case.

Specifically, the rules established here purport to require "complete unbundling" of cable CPE,[18] but would nonetheless permit cable operators to lump the cost of promotional equipment offerings into general system overhead.[19] This cost would then be recovered from rates charged for other services, including basic cable rates. Because telephone companies are not permitted to do the same, these rules would give cable operators an artificial competitive advantage. The Commission should, therefore, modify rules to provide the same treatment for cable and telephone companies alike.

4. The Commission Must Regulate Basic Rates Where Local Regulatory Authorities Decline To Regulate

By declining to regulate basic cable rates where local authorities do not regulate these rates themselves, the Commission's Order would create a regulatory no-man's land in which basic rates would be free of any regulation at all.[20] The

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18 Order at 180.

19 Id. at 190.

20 Id. at 44-47. The only time the Commission would exercise its jurisdiction over basic rates is when a local authority's certification is denied or revoked, or when a local authority can show that it lacks the resources or legal authority to regulate these rates itself. Id. at 46-47. The Commission would not exercise its jurisdiction, however, when a local authority affirmatively decides not to regulate, such as when the local cable operator has sufficient political clout to convince it to forego regulation.

resulting regulatory gap directly contravenes Congressional intent.

The fundamental underlying purpose of the 1992 Act is to protect consumers from the exercise of market power by regulating cable rates in the absence of effective competition.[21] The statute gives effect to this purpose by directing that "[t]he Commission shall, by regulation, ensure that the rates for the basic service tier are reasonable" in order to "protect[] subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed [competitive] rates."[22] By creating a regulatory vacuum in which an entire category of systems are left free of any regulation, therefore, the Commission's rules are contrary to both the statute's stated purpose and its explicit terms.

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[21] The Cable Television Consumer Protection and Competition Act of 1992, § 2(b)(4)-(5). In deciding whether a cable operator faces effective competition, the Commission states that it will consider a video dialtone provider to be a competitor of cable. Order at 18. Regardless of whether it considers video dialtone as a competitor for this purpose, the Commission should make clear that a common carrier providing video dialtone service is not a "multichannel video programming distributor" for purposes of the Act. As the Commission itself previously held, Broadcast Signal Carriage Issues, 7 FCC Rcd 8055 at ¶ 42 (1992), only an entity providing programming services over a video dialtone network -- not the common carrier whose network is being used -- "makes available for purchase, by subscribers or customers, multiple channels of video programming," 47 U.S.C. § 543(l)(1)(B). As a result, while the programmer-customers of a video dialtone network would qualify as a multichannel video programming distributor, a common carrier providing video dialtone service would not.

[22] 47 U.S.C. § 543(b)(1) (emphasis added).

CONCLUSION

The Commission should reconsider its rate regulation rules for cable in the respects identified above.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Petition of Bell Atlantic for Further Reconsideration" was served this 16th day of May, 1994, by first class mail, postage prepaid, on the parties on the attached list.

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